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## Kitsap County Department of Public Works

614 Division Street (MS-26), Port Orchard, WA 98366-4699

R. W. Casteel, P.E., Director

April 12, 2006

Municipal Stormwater Western Washington Phase II Comment  
WA Department of Ecology  
Water Quality Program  
PO Box 47696  
Olympia, WA 98504-7696

### Re: Comments on Draft Western WA Phase II NPDES Municipal Permit

#### General Comments:

While the Kitsap County believes in stormwater management that reduces water pollution, flooding and damage to environmentally sensitive areas, we believe management techniques should be equitable, cost effective and attainable. We would like to bring your attention to instances in which we believe the Draft NPDES Phase II Municipal Stormwater Permit fails to meet these criteria.

**Pre-development, forested conditions – and legal ‘takings’ concerns:** Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We strongly believe that mitigation requirements outlined in the draft permit would leave our jurisdiction very vulnerable to “takings” claims. Specifically, we cite the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General's Office that reads in part, "...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated." The 2001 Herrera Cost Analysis Report (excerpt attached) indicates that the 2005 Ecology manual standard would increase the stormwater mitigation costs of a typical 1-acre commercial development from \$40,000 to \$570,000 (1290% increase). This mitigation impact appears to contradict the above guidance from the Attorney General.

We recommend that the project proponent must mitigate flows (duration and peak as described in the appendix) to the actual predevelopment land use condition. This change is still in keeping with the anti degradation water quality standard since it would

not result in a lowering of the current water quality. This definition is also consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68761:

"Pre-development refers to runoff conditions that exist onsite immediately before the planned development activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred."

We encourage you to reconsider this approach to flow control mitigation.

**Monitoring:** This requirement is not consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68769:

"EPA recommends that in general, NPDES permits for small MS4s should not require the conduct of any additional monitoring beyond monitoring that the small MS4 may be already performing. In the second and subsequent permit terms, EPA expects that some limited ambient monitoring might be appropriately required for perhaps half of the regulated small MS4s. EPA expects that such monitoring will only be done in identified locations for relatively few pollutants of concern. EPA does not anticipate "end-of-pipe" monitoring requirements for regulated small MS4s."

The monitoring requirements in the draft permit are clearly beyond the federal guidelines by requiring jurisdictions to identify outfalls for further monitoring in subsequent permit cycles and therefore are an unfunded state mandate.

We encourage you to look at partnering with already established monitoring plans such as those being conducted by Governor's Salmon Recovery Office, Washington Department of Fish and Wildlife, Northwest Indian Fisheries Commission, and Shared Strategy for Puget Sound instead of creating multiple disjointed small monitoring plans as described in the draft permit.

**Testing of BMPs:** If Ecology wants all public domain BMPs contained within the Stormwater Management Manual for Western Washington subjected to testing, we believe the cost and responsibility for that testing should be borne by Ecology, not local jurisdictions.

We encourage you to look to centralize this testing by creating partnerships with academic agencies or contracting with private testing consultants. Such centralized testing would ensure consistency between sites and BMP types and likely yield more usable results.

**Impact on Road Maintenance, Traffic Safety and Multimodal Transportation Improvements:** The permit states that while gravel shoulders and bituminous surfaces are impervious, the changing of these surfaces to another road covering such as asphalt or concrete is the creation of redeveloped impervious surface. Under the proposed draft permit these surfaces require mitigation for flow and water quality, yet

the flow and water quality characteristics of the road surface are likely unchanged by the overlay process.

Additionally, this policy is counter to development of non-motorized transportation opportunities and traffic safety improvements. If bicycle lanes and sidewalks created by paving an already impervious surface such as a gravel shoulder require full flow rate and water quality mitigation as if they were new, these alternate modes of transportation will either be built at a greatly reduced rate or not at all.

We encourage you to look at the proposed maintenance exceptions found in the Eastern Washington Phase II municipal permit appendix I. These exceptions appear much more balanced and provide for needed traffic safety improvements and maintenance actions while protecting the environment.

**Fiscal, liability, and staffing concerns:** We are concerned that many Phase II jurisdictions are paying new permit fees under Phase II, and yet Ecology still does not plan to have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the "coverage" that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If we have standards that are too high, and a lack of certainty on administrative review and protection, this only serves to *increase* our liability exposure rather than *reduce* it, as was intended.

We encourage you to look for ways to provide a thorough review of Phase II application materials to provide jurisdictions with certainty of compliance.

#### Specific Permit Comments:

1. Page 4 Table 1: This table states condition S8 monitoring site identification is not reported until 180 days prior to the permit expiration date. However, page 36 lines 3 through 12 require the permittee to submit the data not later than the third annual report. Recommend clarifying the due date for information required under S8.
2. Page 8 line 9: This line refers to section S2.D.c. No such section exists in the permit. Recommend changing this reference to S1.D.2.c.
3. Page 15 lines 11 to 19: It is unclear if the maps referred to in S5.C.3.a.i. need to be stand alone maps or if layers within an integrated geographic information system (GIS) are sufficient. Recommend stating that an integrated GIS mapping tool with the above referenced attributes contained within layers is considered sufficient.
4. Page 18 lines 12 to 19: Requires "termination of the connection within 180 days..." Termination of connections or practices may require court action. Jurisdictions cannot guarantee legal timelines decided within the court system. Recommend stating, "termination of the connection must be initiated within 30 days using enforcement authority as needed."

5. Page 22 lines 1 to 9 and Page 23 lines 35 to 39: Section S5.4.ciii requires "water quality treatment facilities including catch basins" to be inspected annually while S5.5.d states that all catch basins must be inspected at least once before the end of the Permit term. These two sections conflict. We recommend removing "including catch basins" from S5.4ciii.
6. Page 23 line 17: This line states that a jurisdiction must complete a maintenance action within 2 years when the capital construction cost is less than \$25,000.00. This time limit may not be achievable in the cases that require additional regulatory permits. Stormwater system construction often requires shoreline substantial development permits, Army Corps section 404 permits, WDFW Hydraulic Project Approvals, and Ecology section 401 permits. All these permits have long time lines and are all subject to appeal. As such many projects take longer than 2 years to get through the regulatory permit process. Recommend adding the phrase "unless delayed by additional regulatory permit processes beyond the applicants control" or words to that effect.
7. Page 31 lines 20 to 25: Section S6.6.ii. is not sufficiently clear. Does Ecology intends to require that secondary permittees store road sand (traction grit) in a "walled and roof structure"? We recommend that sand used for traction control that does not have any de-icer additives not be required to be contained within a roofed and walled structure.
8. Page 33 lines 16 to 28: Recommend that Ecology make it clear the screening tests used in Illicit Discharge program pursuant to section S5.B.3.c.iii is not stormwater monitoring that requires a separate reporting under section S8.B.1.
9. Page 34 lines 32 to 34: The questions listed are vague and do not measure program effectiveness. Recommend changing the first question to read "How effective is a target action or narrow suite of actions in reducing pollutant load from the MS-4 to the receiving water body?" Recommend changing the second question to read: "Is the SWMP achieving a reduction in pollutant load from the MS-4 to the receiving water body?"
10. Page 35 lines 14 to 42 and Page 36 lines 1 to 15: If the intent of the BMP effectiveness monitoring is to determine appropriate use conditions for a BMP and the appropriate design criteria, then the plan listed is unlikely to answer those questions. For jurisdictions that have not adopted technical standards equivalent to the 2005 Stormwater Management Manual for Western Washington prior to the permit timelines, it is very unlikely that BMPs built to that standard will be in the community by the third year of the permit. State vesting laws, permit timelines, and construction schedules create at least a 5 year lag between adoption of a technical standard and widespread post construction implementation. Therefore, BMPs tested under this proposed program will be built to a standard that differs from that required under the permit. Recommend that Ecology coordinate BMP testing using sites known to be built using the criteria listed within the 2005 Stormwater Management Manual for Western Washington to measure their appropriateness

(what pollutants does the BMP remove), and determine the proper design criteria (is the 2005 design standard sufficient or over designed based on the treatment goal).

11. Page 36 lines 13 to 15: This section allows jurisdictions with a single urbanized area to submit a collaborative report. It is unclear if the collaboration allows consolidation of monitoring sites and activities. For example if a county with a population over 100,000 collaborates with 2 cities with populations over 50,000 on BMP effectiveness monitoring, how many BMPs and sites are they required to test? Individually the total number of types of BMPs would be 6 with at least two sites for each type of BMP. Is the number different if these jurisdictions collaborate?

If the jurisdictions collaborate on program effectiveness monitoring, do two separate actions from each jurisdiction have to be evaluated or can two practices common to all jurisdictions be evaluated?

12. Page 36 lines 17 to 19: As written the permit requires reporting on actions taken through December 31, 2008 on or before March 31, 2008. Recommend changing first annual report period to the effective date of the permit through December 31, 2007.

#### Appendix I comments:

1. This appendix requires one to mitigate flow to a forested condition. However, for projects in which the predevelopment land cover is not forest, this standard requires mitigation beyond the impact of the proposed development. Such a situation is grounds for a takings claim.

State of Washington Attorney General's recommended process and advisory memorandum for evaluation of proposed regulatory or administrative actions to avoid unconstitutional takings of private property March 1995 states:

"However, a permit condition which imposes substantial costs or limitations on property use could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated."

The 2001 Herrera Cost Analysis Report indicates that the 2005 Ecology manual standard would increase the stormwater mitigation costs of a typical 1-acre commercial development from \$40,000 to \$570,000 (1290% increase). This mitigation's financial impact appears to contradict the above guidance from the Attorney General.

We recommend that the project proponent must mitigate flows (duration and peak as described in the appendix) to the actual predevelopment land use condition. This change is still in keeping with the anti degradation water quality standard since it would not result in a lowering of the current water quality. This definition is also

consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68761:

"Pre-development refers to runoff conditions that exist onsite immediately before the planned development activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred."

2. Appendix 1 page 2 first two bullets: This section states that while gravel shoulders and bituminous surfaces are impervious, the changing of these surfaces to another road covering such as asphalt or concrete is the creation of redeveloped impervious surface. Under the proposed draft permit these surfaces require mitigation for flow and water quality, yet the flow and water quality characteristics of the road surface are likely unchanged or improved by the overlay process.

Additionally, this policy is counter to development of non-motorized transportation opportunities and traffic safety improvements. If bicycle lanes and sidewalks created by paving an already impervious surface such as a gravel shoulder require full flow rate and water quality mitigation as if they were new, these alternate modes of transportation will either be built at a greatly reduced rate or not at all.

We encourage you to look at the proposed maintenance exceptions found in the Eastern Washington Phase II municipal permit appendix I. These exceptions appear much more balanced and provide for needed traffic safety improvements and maintenance actions while protecting the environment

Recommend the exemptions for road maintenance listed in Appendix I page 2 lines 9 to 41 of the Eastern Washington draft Phase II permit.

3. There are several references to chapters and volumes of an unidentified document. We recommend the following additions:

2.5 Minimum Requirement 1. Clarify that Chapter 3 of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

2.5 Minimum Requirement 3. Clarify that Ecology's Western Washington Stormwater Management Manual is the manual being referenced.

2.5 Minimum Requirement 4. There are cases where energy dissipation is not necessary at an outfall. Strike the statement "All outfalls require energy dissipation".

2.5 Minimum Requirement 5. Clarify that Chapter 3 of Volume III and Chapter 5 Volume V of Ecology's Western Washington Stormwater Management Manual are the documents being referenced.

Minimum Requirement 6 - Treatment Facility Sizing. Clarify that Chapter 2 Volume III of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 6 - Treatment Facility Selection, Design and Maintenance. Clarify that Chapters 4 Volume I and Volume V of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 7 – Additional Requirement - Clarify that Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 8 – Standard Requirement - Clarify that Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 10 – Operation and Maintenance - Clarify that Volume V of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Appendix III comments:

1. Format of Report: We recommend listing the required reporting parameters by year of the permit as done in the Eastern Washington Permit Annual Report. We recommend duplicating the format used in the Eastern Washington permit annual report. This uniformity would make it easier for the public and Ecology to review for compliance.
2. Actions completed prior to the permit: This report format does not account for actions taken prior to the permit. The questions should be written to account for prior acts such as creation of the stormwater management plan prior to the permit, watershed illicit discharge screening done prior to the permit, and training conducted prior to the permit.
3. Page 3 and 4 *Instructions for cost reporting for specific program components*: The specific components listed in the instructions do not match those in form 1.2. The instructions match the Phase I cost reporting form. Recommend listing the instructions for categories that match form 1.2 for Phase II.
4. Tracking and reporting program expenditures is an unnecessary administrative task. Expenditures and water quality outcomes are not necessarily linked. While it is relatively easy to report total amount of money collected by a stormwater utility, it is not reasonable to request that County's who will have SWMP activities occurring in permit and non permit areas, to segregate their tracking and accounting systems in order to report costs of development and implementation to the state. In addition, Ecology also needs to recognize that other local programs outside of a stormwater utility may be providing services that are not easily tracked or reported as a subset

of permit / non permit areas, e.g. the solid waste utility in a jurisdiction may provide the education and outreach associated with disposal of toxics materials like oil, batteries and home chemicals, or operate a moderate risk waste facility that serves the greater community. Lastly, dollars expended indicates neither program effectiveness nor efficiency it only represents the amount of money spent. The numbers reported will not capture all that could and should be reported as cost of compliance and will have significant variability resultant of the level of sophistication of accounting systems. This information will require a significant amount of effort to generate and will be of little value.

5. Form 1 Section S5.C.5.d requires "summary of dates of inspections and cleaning performed" for all catch basins and inlets. Most covered jurisdictions have multiple thousands of such items. Does Ecology really want a list with the over 10,000 catch basins that are inspected or cleaned annually by Kitsap County? Recommend changing reporting condition to % of total number of catch basins and inlets inspected or cleaned from the effective date of the permit to reporting date and during the particular reporting period.
6. Form 1 Section S5.C.4.e requires "summary of copies made available, dates and recipients" of notices of intent related to construction and industrial NPDES permits. It is difficult to provide the name of each recipient of a document that a city or county makes readily available to the public. This situation is particularly problematical when documents are made available electronically over the internet. We recommend changing the reporting parameter to a summary of process used to make copies of NOI available to the public that includes an estimate of the number and types of NOIs distributed to the public (web site hits and paper copies generated).
7. The report form format does not appear to include questions that address some of the federal requirements listed under 40CFR122.35(g)(3).

#### Fact Sheet comments:

1. Page 3 line 40 states phase II rule finalized in 2000. Per the EPA website the rule was published on 12/08/1999.
2. Page 45 line 40 states "Appendix 1 Core Element #2". Appendix 1 uses the phrase "minimum requirement". Recommend using only one term in both documents.
3. Appendix B does not include any public school districts. Notice to the State Office of Superintendent of Public Instruction does not seem adequate to inform local school districts of possible obligations as a potential secondary permittee. Recommend sending notification letters to all local school districts located within coverage areas.



Our staff contact for these comments is David Tucker, Senior Program Manager  
Surface and Stormwater Management Program. He can be reached at (360) 337-7292.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy W. Casteel". The signature is fluid and cursive, with a large initial "R" and a stylized "C" at the end.

Randy W. Casteel, P.E.  
Director of Public Works

cc: Commissioner Jan Angel  
Commissioner Chris Endresen  
Commissioner Patty Lent  
Cris Gears, County Administrator  
David Tucker P.E., Senior Program Manager SSWM

